No. 433

SEP 29 1955

HAROLD B. WILLEY, Clerk

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

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THE STATE OF KANSAS, EX REL LELUS B. BROWN, County Attorney of Harvey County, Kansas, the BOARD OF COUNTY COMMISSIONERS of Harvey County, Kansas; HALSTEAD TOWNSHIP of Harvey County, Kansas; LAKIN TOWNSHIP of Harvey County, Kansas; HALSTEAD COMMON SCHOOL DISTRICT No. 52 of Halstead, Kansas; RURAL HIGH SCHOOL DISTRICT No. 1 of Halstead, Kansas; BENTLEY PUBLIC SCHOOL DISTRICT No. 185, JOINT, of Bentley, Kansas; and VALLEY CENTER TOWNSHIP of Sedgwick County, Kansas,

APPELLANTS,

*vs.*

CLAY HEDRICK, as County Clerk of Harvey County, Kansas; the STATE COMMISSION OF REVENUE AND TAXATION of the State of Kansas; and the CITY OF WICHITA, KANSAS,

APPELLEES.

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

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## JURISDICTIONAL STATEMENT.

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KANSAS LAW PUB. CO., TOPEKA

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APPELLEES.

---

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

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## JURISDICTIONAL STATEMENT.

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### INTRODUCTION.

Appellants above-named appeal from the final judgment of the Supreme Court of the State of Kansas, entered on May 7, 1955, (Rehearing denied June 17, 1955),

affirming the judgment of the District Court of Harvey County, Kansas, quashing the Motion for an Alternative Writ of Mandamus theretofore granted and issued, thereby granting tax exempt status to certain property owned by the City of Wichita, Kansas, which is claimed to be taxable by each, and all of the appellants.

Appellants respectfully submit this Jurisdictional Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial Federal questions are presented.

## OPINION BELOW.

The opinion of the Supreme Court of Kansas is reported in 178 Kan. 135, 283 Pac. 2d 437. Copy of opinion is hereto attached as Appendix A. The District Court did not file an opinion. There is also attached hereto as Appendix B a copy of the Journal Entry of the District Court of Harvey County, Kansas.

## JURISDICTION.

This is an action in mandamus brought under General Statutes of Kansas 1949, Chapter 60, Article 17, (Relating to Mandamus), by the State of Kansas on relation of Lelus B. Brown, County Attorney of Harvey County, Kansas, (pursuant to his obligation and authority under G. S. 1949, 19-702), to compel Clay Hedrick, as County Clerk of Harvey County, Kansas, to assess and levy taxes on certain property located in Harvey County, Kansas, owned by the City of Wichita, the beneficial use of which was alleged to be in the Wichita Water

Company, a private corporation organized for profit. (D. C. Rec. p. 1; S. Ct. Rec. 1d)

The other parties hereto were either granted leave to intervene or made parties defendant by order of the District Court. (D. C. Rec. pp. 17, 19, 28, 29; S. Ct. Rec. 1m, o, t, u)

The judgment of the District Court of Harvey County, Kansas, sustaining the City of Wichita's Motion to Quash the motion for an Alternative Writ of Mandamus, was entered on August 23, 1954; the Supreme Court of Kansas affirmed such judgment on May 7, 1955, and denied Rehearing on June 17, 1955. Notice of Appeal to this court was filed on September 6, 1955, in the District Court of Harvey County, Kansas, and on September 7, 1955, in the Supreme Court of Kansas. (There being doubt by appellants' counsel as to which court is actually "possessed of the record".)

The jurisdiction of the Supreme Court of the United States to review, by appeal, is conferred by Title 28, U.S. Code Section 1257 (2). The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the judgment below on appeal in this case: *Jett Bros. Distilling Co. v. Carrollton,* 262 U.S. 1,6; 40 S. Ct. 255; 64 L. Ed. 421, 423; *Baltimore & Potomac R. Co. v. Hopkins,* 130 U. S. 210, 224; 9 S. Ct. 503; 32 L. Ed. 908; *Miller v. Cornwall R. Co.,* 168 U.S. 131, 133; 18 S. Ct. 34; 42 L. Ed. 409, 410; *Wheeler v. N.Y., N.H. & H.R. Co.,* 178 U.S. 321, 323; 20 S. Ct. 949; 44 L Ed. 1085, 1086, Headnote 1; *Buchanan v. Warley,* 245 U.S. 60, 74; 62 L. Ed. 149; *Ex Parte Virginia,* 100 U.S. 339; 25 L. Ed. 676,

679; *Shelley v. Kraemer*, 334 U.S. 1, 14; 68 S. Ct. 836; 92 L. Ed. 1161, 1181; *Barrows v. Jackson*, 346 U.S. 249, 257; 73 S. Ct. 1031; 97 L. Ed. 1586, 1596; *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282; 42 S. Ct. 106; 66 L. Ed. 239.

In any event, if appeal is not proper, then this should be treated as a Petition for Writ of Certiorari under Title 28 U.S.C. Section 2103. *Charleston Federal Savings & Loan Assn. v. Alderson*, 324 U.S. 182, 187; 65 S. Ct. 624; 89 L. Ed. 857, 862.

Jurisdiction of this Court extends to other errors denying a Federal right. *Flournoy v. Wiener*, 321 U.S. 253, 263; 64 S. Ct. 548; 88 L. Ed. 708, 715.

## QUESTIONS PRESENTED.

(1) Is not General Statutes of Kansas, 1949, 79-201, *Seventh*, which provided:

> "That the property described in this section, *to the extent herein limited*, shall be exempt from taxation: . . .
>
> "Seventh. *All* works, machinery and fixtures belonging to and owned by any town, city or village and *used exclusively for conveying water to such town, city or village.*" (Emphasis supplied)

void under the "due process" or "equal protection" clause of the 14th Amendment to the United States Constitution, *when it has been construed* to grant tax exempt status to property, the legal title to which is vested in the City of Wichita, Kansas, but the beneficial use of such property is in the Wichita Water Company, a private corporation organized for profit?

(2) Is not a statute void under the "due process" or "equal protection" clause of the 14th Amendment to the United States Constitution *when it is construed* to grant tax exemption to property beneficially used by private enterprises, where the Kansas Constitution grants tax exemption *only* to "all property used exclusively for . . . municipal . . . purposes . . ."?

(3) Does not either the Kansas Legislature or the Kansas Court violate the "due process" or "equal protection" clause of the 14th Amendment to the United States Constitution when either or both ignore the "uniform and equal" provision of the Kansas Constitution with respect to taxation in enacting or construing a tax exemption statute?

(4) Is not extension of tax exemption beyond the Kansas Constitutional provision, requiring "exclusive use for municipal purposes" for tax exemption, void under the "due process" or "equal protection" clause of the 14th Amendment to the United States Constitution?

(5) Is not the granting of tax exemption to property owned by a city in its "proprietary" capacity, located outside the jurisdiction of the city, but within the jurisdiction of these appellant taxing authorities who derive no benefit from such property, void under the "due process" or "equal protection" clause of the 14th Amendment to the United States Constitution?

## STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED.

General Statutes of Kansas 1949, 79-201, *Seventh*, which provides, in so far as material, as follows:

> "That the property described in this section, *to the extent herein limited*, shall be exempt from taxation: . . .
>
> "Seventh. *All* works, machinery and fixtures belonging to and owned by any town, city or village and *used exclusively for conveying water to such town, city or village.*" (Emphasis supplied)

The statute is set forth in full in Appendix C, *infra*, p. 34.

Article XI, Section 1 of the Kansas Constitution which provides, in so far as material, as follows:

> "The legislature shall provide for a *uniform and equal* rate of assessment and taxation, . . . *All property used exclusively for state, county, municipal, literary, education, scientific, religious, benevolent and charitable purposes, . . ., shall be exempted from taxation.*" (Emphasis supplied)

The constitutional provision is set forth in full in Appendix C, *infra*, p. 33.

Section 1 of the 14th Amendment to the Constitution of the United States which provides, in so far as material, as follows:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Section 1 of the 14th Amendment to the United States Constitution is set forth in full in Appendix C, *infra*, p. 33.

## STATEMENT OF THE CASE.

This is an action in mandamus brought in the District Court of Harvey County, Kansas, by the State of Kansas on the relation of Lelus B. Brown, County Attorney of Harvey County, Kansas, against Clay Hedrick, as County Clerk of Harvey County, Kansas, for the purpose of compelling him to assess and tax all property within Harvey County, Kansas, standing in the name of the City of Wichita, Kansas, (Wichita is located in Sedgwick County, Kansas); upon the basis and for the reason that, although Wichita holds legal title thereto, nevertheless the beneficial use thereof was, and is, in the Wichita Water Company, a private corporation organized for profit. (D.C. Rec. 1; S. Ct. Rec. 1d)

The District Court issued an Alternative Writ of Mandamus (D.C. Rec. 14; S. Ct. Rec. 1L) The Answer of Clay Hedrick, as County Clerk, disclosed that the State Commission of Revenue and Taxation of the State of Kansas had previously ruled upon the taxability of a portion of the property in question (D.C. Rec. 18; S. Ct. Rec. 1k) whereupon the State Commission of Revenue and Taxation of the State of Kansas was made a party and answered. (D.C. Rec. 17, S. Ct. Rec. 1m)

Subsequently, upon oral suggestion, the District Court made the City of Wichita, Kansas, the Board of County Commissioners of Harvey County, Kansas, Halstead

Township of Harvey County, Kansas, and Lakin Township of Harvey County, Kansas, parties (D.C. Rec. 19; S. Ct. Rec. 1o) all of whom, with the exception of the City of Wichita, filed Answers praying for the same relief sought by the State of Kansas. (D.C. Rec. 20, 30; S. Ct. Rec. 1o, u)

Thereafter, upon application for leave to intervene (D.C. Rec. 22, 23, 24; S. Ct. Rec. 1g, r) the remaining Appellants were made parties (D.C. Rec. 28, 29; S. Ct. Rec. 1t, u) and filed Answer praying for the same relief sought by the State of Kansas, and expressly relied upon the "equal protection" clause of the 14th Amendment to the United States Constitution. (D.C. Rec. 32, 34; S. Ct. Rec. 1v, x)

The City of Wichita, Kansas, filed its Motion to Quash (D.C. Rec. 26; S. Ct. Rec. 1s) which is equivalent to a Demurrer and admits all the well pleaded allegations of the pleading attacked. (*State ex rel v. Hedrick*, 178 Kan. 135, 139.) (Opinion attached hereto as Appendix A, *infra*, pp. 27-28)

On August 23, 1954, the District Court sustained the City's Motion to Quash the Motion for an Alternative Writ of Mandamus (D.C. Rec. 36; S. Ct. Rec. 1z) (Journal Entry, Appendix B, *infra*, p. 32)

The Appellants, and each of them, appealed the ruling of the District Court to the Supreme Court of Kansas. (D.C. Rec. 38; S. Ct. Rec. 1z) On May 7, 1955, the Supreme Court of Kansas affirmed the District Court. (D. C. Rec. 40; S. Ct. Rec. 5) Motion for Rehearing was

denied on June 17, 1955, (D.C. Rec. 50; S. Ct. Rec. 21) and Notice of Appeal to this Court was filed in the District Court on September 6, 1955, (D.C. Rec. 60), and in the Supreme Court of Kansas (S. Ct. Rec. 23) on September 7, 1955. (Counsel for Appellants were in doubt just which Court was "possessed of the record" as contemplated by Rule 10 (3).)

*How the Federal Question is presented:* Intervenor Appellants, in their respective Answers, specifically stated:

> "That failure to tax said property in the past, and at this time, has been and is . . . and in violation of the 14th Amendment of the Constitution of the United States by reason of denial to these respective defendants, and their taxpayers of equal protection under the law . . ." (D.C. Rec. 31, 33, 35; S. Ct. Rec. 1v, x, y)

At every stage of the proceedings, Appellants have consistently argued and insisted upon each of the "Questions Presented"; the Supreme Court of Kansas expressly recognized that Appellants' contentions involved Federal Constitutional questions; in their opinion the Court said:

> "Appellants premise their argument by directing attention to . . ., *and to the fourteenth amendment to the constitution of the United States that no state shall deprive any person of property without due process of law nor deny any person within its jurisdiction the equal protection of the law,* . . ." (Appendix A, p. 27). (Emphasis supplied)

and further said:

> "Appellants' contentions are all based on their assumption that beneficial use is in the company, and are presented under three general headings: (1) The property is not exempt by statute; (2) The property is not exempt under the constitution; and (3) The exemption violates constitutional provisions." (Appendix A, p. 28)

The Supreme Court of Kansas having recognized that a Federal question was properly before it, an irrebuttable presumption arises that the Federal question was timely and properly raised. *Charleston Federal Savings & Loan Assn. v. Alderson*, 324 U.S. 182, 185-6; 65 S. Ct. 624; 89 L. Ed. 857, 861.

The Federal questions having been recognized, even though the Supreme Court of Kansas failed to explicitly discuss or decide the Federal questions, the statute was "sustained"; therefore the court necessarily rejected Appellants' contentions that the statute, if construed to grant tax exemption, was void under the 14th Amendment to the Constitution of the United States. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282; 42 S. Ct. 106; 66 L. Ed. 239; *Supreme Court Practice*, 2d Ed. Stern and Gressman p. 57.

In this case each and all of the Appellants have jurisdiction of the property, or some part thereof, for tax purposes; their tax revenues being directly at stake, each Appellant has a special "property right" in the tax ability of such property.

Furthermore, each Appellant, and particularly the State of Kansas, has standing as *parens patriae,* to maintain this action on behalf of its citizens and taxpayers, each of whom will necessarily have his tax burden increased if tax exemption is sustained, thus each taxpayer will be deprived of his property without due process of law and each will be denied the equal protection of the law by the action of the State, acting through the Legislature and the State Courts.

The finding of fact or conclusion of law by the Supreme Court of Kansas is not binding upon this Court (being merely construction of the pleading and the franchise ordinance, Opinion, Appendix A, *infra,* pp. 27-28). *Norris v. Alabama,* 294 U.S. 587, 590; 55 S. Ct. 579, 79 L. Ed. 1074, 1077.

The undisputed, and indisputable fact is that the Water Company is the *sole* and *only* customer of the City and the City's operations *are vital* to the Water Company. The City provides most, if not all, of the water which the Water Company distributes and sells, *at a profit.* The *only* entity *directly* benefited by the City's water production, transmission and treatment facilities is the Water Company!

Nor is this Court bound by the erroneous statement by the Supreme Court of Kansas that distribution of the water by the City is "in itself a legal function under its *governmental and police power*". (Opinion, Appendix A, *infra,* p. 30)

Such statement cannot be maintained upon either reason or authority. Kansas has always been committed to the standard, and uniform, rule that a city is functioning in a "proprietary" or "private" capacity when it engages in a business enterprise; obviously any operation incident to production and sale of water is proprietary and *not* "governmental" *nor* is it the exercise of "police power" (*McGinley v. City of Cherryvale,* 141 Kan. 155, 158; 40 Pac. 2d 377). This Court has also recognized, and applied, the same rule to operations by a State. *Ohio v. Helvering,* 292 U.S. 360; 54 S. Ct. 725; 78 L. Ed. 1307; *New York v. U.S.,* 326 U.S. 572; 90 L. Ed. 326.

## THE FEDERAL QUESTIONS ARE SUBSTANTIAL.

This Appeal presents a question of far-reaching importance and vital concern to every taxing authority in the United States.

The answer to the question, "May a municipally owned business enterprise invade the jurisdiction of other governmental authorities without tax liability?", is of vital concern to every tax-payer. Tax exemption means increased taxes to everyone whose property or business is taxable.

Appellants believe, and respectfully submit, that this Court has jurisdiction to, and should, decide the questions presented. The problem created by the extension of municipally owned business enterprises into the jurisdiction of other governmental agencies is already acute and has every indication of reaching enormous magnitude.

The technical inability of the individual taxpayer to obtain relief from "deprivation of property" by taxation, or exemption, requires suit by governmental authority in its capacity of *parens patriae.*

The real question here presented, than which no question concerning the property rights of the citizen is of more transcendent moment, is: "Whether the Legislature, or the Courts, may grant tax exemption to a business enterprise (though affected by a public interest and partly or wholly owned by a governmental agency) and thus coerce contributions from citizens who have no interest in and receive no benefit from such enterprise?"

It is not a question of "local law" but is one of extreme concern protected by the 14th Amendment to the Constitution of the United States.

Each of the Appellants is vitally concerned with the taxability of the property in question. Each is either wholly, or to a large extent, dependent upon tax revenues in order to carry out its necessary "governmental" functions.

Not only is "the power to tax, the power to destroy" but also "the inability to tax, can result in destruction"! (*New York v. United States,* 326 U. S. 572, 90 L. Ed. 326)

The situation presented in this Appeal has enormous potentiality for the literal destruction of the Appellant School Districts and Townships and serious impairment of the functioning ability of the State and County. Each *ad valorem* taxpayer within the jurisdiction of each of the Appellants has had to "make up the difference" because of the failure to tax the Appellee City's prop-

erty and, to that extent, each of such taxpayers has been and will be "deprived of his property without due process of law".

To permit the City of Wichita, while engaging in a purely "proprietary" enterprise, to invade the jurisdiction of these Appellants, obtain protection and benefits from them, and not be required to contribute taxwise to them, cannot be sustained under the very fundamental concepts of the American form of Government, nor under the 14th Amendment to the Constitution of the United States.

This Court, in the case of *Savings & Loan Assn. v. Topeka*, 20 Wall. (87 U. S.) 655, 663; 22 L. Ed. 455, 461, said:

> "The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers . . .
>
> The power to tax is, therefore, the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of the people. . . . *This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised.*
>
> To lay, with one hand, the power of the government on the property of the citizen, and *with the other to bestow it upon favored individuals to aid private enterprise* and build up private fortunes, *is none the less a robbery* because it is done under the forms of law and is called taxation."

Tax exemption results in an unconstitutional gift of cheaper water to the customers of the Wichita Water Company, at the expense of these Appellants and the taxpayers within the jurisdiction of each.

The Constitution is a solemn and, to every American, a sacred compact between the citizen and his Government; inviolable; and unchangeable, except by specified procedure. Rights guaranteed thereby cannot be denied or taken away by ignoring or evading such provisions.

The only difference between the Constitution of a State and the Constitution of the United States, insofar as the protection afforded thereby is concerned, is that the Constitution of the United States " . . . shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding", and every public official, State or Federal, shall be bound by Oath of Affirmation to support it.

The protections afforded by the Federal Constitution cannot be avoided, by-passed or disregarded by any State, and one of the most important functions of this Court is to apply and enforce the Federal Constitution. *Farrington v. Tennessee,* 5 Otto (95 U. S.) 679, 682; 24 L. Ed. 558.

Neither the Legislature nor the State Courts may either transgress, avoid, ignore or exceed the powers denied or granted by the State Constitution, *and thereby deprive any person of property,* without running afoul of the "due process" clause of the 14th Amendment to the Constitution of the United States; nor can either

of them avoid the "equal protection" clause of such Amendment by any device or subterfuge.

Any legislation designed or interpreted to avoid or defeat State Constitutional limitations or prohibitions is void if the result be "to take property" or to "deny equal protection of the law". Such legislation, either as written or interpreted, is void as being in contravention of the Federal Constitution. *Lawrence v. State Tax Commission,* 286 U.S. 276, 282; 52 S. Ct. 556; 76 L. Ed. 1102.

Action of State Courts is to be regarded as action of the State within the meaning of the Fourteenth Amendment. *Shelley v. Kraemer,* 334 U.S. 1, 14; 92 L. Ed. 1161, 1181.

Section 1 of Article XI of the Kansas Constitution, for the purposes of this case, is but one *fact* which must be considered by this Court in arriving at the decision: "Have Appellants (and their respective taxpayer) been deprived of their property without due process of law or have they been denied the equal protection of the law?"

The Kansas Constitution (Appendix C, *infra,* p. 33) requires "a uniform and equal rate of assessment and taxation" and also expressly specifies just what property shall be exempted from taxation. The history of the Constitutional provision compels recognition, *as a fact which cannot be ignored,* that the provision is a *limitation on the power to exempt from taxation.*

History is replete with the vice *and danger* of unrestricted authority to grant exemption from taxation. This Court in the case of *The Providence Bank v. Billings and*

*Pittman*, 4 Peters (29 U.S.) 514, 562; 7 L. Ed. 939, 956, speaking through Chief Justice Marshall, said:

> "That the taxing power is of vital importance; that it is essential to the existence of government; are truths which it cannot be necessary to re-affirm. They are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a State may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it may not exist; *but as the whole community is interested in retaining it undiminished, that community has a right to insist* that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear."

The intent to abandon and the limit of abandonment of the taxing power are both *facts* which this Court must pass upon in determining whether either the Kansas Legislature or the Supreme Court of Kansas, or both, violated the rights of Appellants under the 14th Amendment, by granting, or construing the statute to grant, tax exemption to the property sought to be taxed.

Kansas, as other States, has had its financial troubles and the Constitution reflects the experience of the people which teaches one basic principle of Government: "The only safe way to prevent abuse of the power of taxation, is to spell it out in the Constitution."

*On two separate occasions the people of Kansas have rejected* efforts to modify the "uniform and equal" clause and to remove the limitations on "tax exemption". (See Certificate of the Secretary of State of Kansas in re:

proposed tax amendments to the Constitution, Appendix D, *infra*, p. 36)

Since the rejection of the proposed amendments, *the limitation on the power* of the Kansas Legislature and Courts, *to grant, or extend, tax exemption* beyond the express provisions, *is a fact* and *not a matter of interpretation or construction.*

1. The statute, General Statutes of Kansas 1949, 79-201, *Seventh*, Appendix C, *infra*, p. 34, is clear, precise and exact, it needs no construction, but can, and must be applied to the undisputed, and indisputable fact of the case, viz: the Wichita Water Company and its customers have the exclusive beneficial use of the property in question. The Water Company is the sole and only customer of the City and it, not the City, is the distributor of all water within, and in the vicinity of the City of Wichita.

The Kansas Supreme Court, in this case, reiterated the uniform rule that *"taxation is the rule, exemption is the exception, statutes granting an exemption are strictly construed, and those claiming the exemption have the burden of showing clearly that the facts entitle them to the exemption."* Opinion, Appendix A, *infra*, p. 29.

The admitted facts of this case show conclusively that the property does *not fall* within the scope of the statute, but do show that *all of such property is used exclusively to convey water to the Water Company* and not "to such City".

This Court is not bound by any statement or interpretation of the Kansas Supreme Court as to what the facts are, but is free to make an independent examination of

such facts in deciding whether these Appellants, and the taxpayers each represents, have been deprived of fundamental rights secured by the Federal Constitution. *Norris v. Alabama,* 294 U.S. 587, 590; 55 S. Ct. 579; 79 L. Ed. 1074; *Supreme Court Practice,* 2d Ed. Stern and Gressman, p. 101.

Without question, if the property were owned as well as beneficially used by the Water Company, it would be subject to taxation. The "due process" and "equal protection of the law" clauses of the 14th Amendment require that no taxable property shall be relieved of taxation, *by any device or subterfuge,* at the expense of remaining property and other taxpayers.

Kansas Courts, as well as all other Courts, have and will look "through form to substance" to prevent fraud and abuse of privilege (See *State ex rel v. Miller,* 177 Kan. 324, 336; ... Pac. 2d ...) and must do so if Constitutional guaranties are involved.

Private enterprise being the direct recipient of the benefits derived or derivable from the use of the property in question requires taxation thereof.

2. The "uniform and equal rate of assessment and taxation" provision of the Kansas Constitution, (Appendix C, *infra,* p. 33) *is a material fact* which must be taken into account in considering whether Appellants, and the taxpayers represented by them, have been deprived of substantial rights guaranteed by the 14th Amendment.

As demonstrated above, the people of Kansas have unequivocally stated, by rejection of two proposals to

amend, that the Constitutional provision means just what it says and is not subject to construction nor extension beyond its exact words.

"Uniform and equal" needs no construction nor interpretation; the people of Kansas have foreclosed any construction or interpretation thereof (See Appendix D, *infra,* p. 36); the Legislature is without authority to deviate therefrom or to establish "an equitable system of taxation" or a "just and equitable system of taxation", neither does the Legislature have any authority to "classify the subjects of taxation" except within the limits specified precisely by the Constitution. The only taxing system permitted in Kansas, and *guaranteed by* the 14th Amendment to the Federal Constitution, is one that is "uniform and equal" except that "all property *used exclusively for municipal purposes* shall be exempted from taxation". (See Appendix C, *infra,* p. 33, Art. XI, Sec. 1, Kansas Const.)

Any effort to avoid, evade, or deny the taxation system thereby guaranteed is necessarily void under the 14th Amendment to the Federal Constitution. *Lawrence v. State Tax Commission,* 286 U.S. 276, 282; 52 S. Ct. 556; 76 L. Ed. 1102.

3. Neither the Kansas Legislature nor the Court can grant or extend tax exemption unless the property is used exclusively for municipal purpose. No State, or any of its agencies, is using property for "exclusive public purpose" when it is devoted exclusively to the business enterprise of producing and selling water, or any other

commodity. When a City goes into the business of buying and selling a commodity it takes on the character of a private trader, so far, at least, as the taxing power of other taxing authorities concerned or affected by such business enterprise are concerned. *Ohio v. Helvering,* 292 U.S. 360, 54 S. Ct. 725; 78 L. Ed. 1307; *New York v. United States,* 326 U.S. 572; 90 L. Ed. 326.

In Kansas, as elsewhere, when a City engages in a business enterprise it also assumes the usual burdens of business (*McCormick v. Kansas City,* 127 Kan. 255, 257; 273 Pac. 471; *McGinley v. City of Cherryvale,* 141 Kan. 155, 158; 40 Pac. 2d 377). What burden is more usual to business than taxation?

By the amount of exemption from taxation improperly and wrongfully extended to the City of Wichita (and through it to the Water Company) have the Appellants been deprived of their rightful property—tax revenue therefrom—and by that amount have the taxpayers represented by Appellants been deprived of their property—increased taxation to make up such exemption—all in violation of the "due process" and "equal protection" clauses of the 14th Amendment to the Federal Constitution. *Lawrence v. State Tax Commission,* 286 U.S. 276, 282; 52 S. Ct. 556; 76 L. Ed. 1102, 1106-07.

4. It is clear that arbitrary disregard of the Constitutional limitation on tax exemption by the Supreme Court and the Legislature of Kansas must render the Statute void, otherwise the assumed protection against deprivation of property without due process of law and

the guarantee of "equal protection of the law" afforded by the 14th Amendment is purely an illusion and not one of substance.

The Courts and Legislature are bound to follow the mandate of the people and nothing less than full, fair and real compliance therewith can be permitted to stand.

If this exemption should be sustained, then everyone, or anyone, especially every public utility corporation, could retain (and some have) the use of property and escape taxation thereon by the simple device and subterfuge of placing the legal title in some municipal body. Disaster must necessarily be the only result of such a course: Unholy competition between municipalities to "make a good deal at the expense of others" must necessarily result, with the poor taxpayer being left to "foot the bill".

## CONCLUSION.

Appellants respectfully submit that the Federal question presented by this appeal are substantial and are of nation-wide importance.

Respectfully submitted,

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Newton, Kansas,
Counsel for Appellants.

Of Counsel for Appellants:
LELUS B. BROWN,
County Attorney of Harvey County,
Newton, Kansas.

## APPENDIX A.

No. 39,721

STATE OF KANSAS, ex rel., Lelus B. Brown, County Attorney of Harvey County, Kansas, *Appellant*, v. Clay Hedrick, as county clerk of Harvey County, Kansas; The State Commission of Revenue and Taxation of the State of Kansas, and the City of Wichita, Kansas, *Appellees*, and The Board of County Commissioners of Harvey County, Kansas; Halstead Township of Harvey County, Kansas; Lakin Township of Harvey County, Kansas; Halstead Common School District No. 52 of Halstead, Kansas; Rural High School District No. 1 of Halstead, Kansas; Bentley Public School District No. 185, Joint, of Bentley, Kansas; and Valley Center Township of Sedgwick County Kansas, *Appellants*.

### SYLLABUS BY THE COURT

1.

The record examined in a proceeding in mandamus filed in the district court to compel the county clerk to assess for taxation certain property situated in his court, and *held*, that the motion for the alternative writ of mandamus and the alternative writ issued disclose that the property, consisting of water pipe lines, pumping equipment and other appurtenances, belongs to and is owned by a city of the first class, is used exclusively for conveying water to such city, and is exempt from taxation under the provisions of G.S. 1949, 79-201, *Seventh*.

2.

The record further examined, and *held*, that the trial court did not err in sustaining the city's motion to quash the plaintiff's motion for the alternative writ of mandamus and the alternative writ issued.

Appeal from Harvey District Court; ALFRED G. SCHROEDER, judge. Opinion filed May 7, 1955. Affirmed.

*Kenneth G. Speir*, of Newton, argued the cause, and *Lelus B. Brown*, County Attorney of Harvey County, Kansas, was with him on the brief for the appellants the State of Kansas and the Board of County Commissioners of Harvey County, Kansas.

*J. Rodney Stone*, of Newton, was on the brief for the appellants Halstead and Lakin Townships of Harvey County, Kansas; Halstead Common School District No. 52 and Rural High School District No. 1, of Halstead, Kansas; Bentley Public School District No. 185, Jt., of Bentley, Kansas; and Valley Center Township of Sedgwick County, Kansas.

*Arthur N. Turner*, of Newton, argued the cause, and *Alden E. Branine*, and *C. Fred Ice*, both of Newton, were with him on the brief for the appellee Clay Hedrick, as County Clerk of Harvey County, Kansas.

*DOUGLAS E. SHAY*, of Wichita, argued the cause, and *Fred W. Aley*, of Wichita, was with him on the brief for appellee the City of Wichita.

The opinion of the court was delivered by

THIELE, J.: The state on the relation of the county attorney of Harvey county instituted a proceeding in the district court of that county to compel the couny clerk to assess certain property, later mentioned, for taxation, and on the same day an alternative writ was issued. Thereafter the State Commission of Revenue and Taxation, the Board of County Commissioners of Harvey County and the city of Wichita and two townships were made defendants and other municipal corporations who would share in any tax levied, were permitted to intervene. The city of Wichita filed its motion to quash the motion for and the alternative writ of mandamus issued.

The trial court sustained the motion to quash, and the plaintiff, the Board of County Commissioners and the various municipal corporations other than the city of Wichita have appealed.

In view of the questions presented on the appeal, it is not necessary that all of the pleadings be reviewed.

In the motion for the writ filed April 19, 1954, the plaintiff alleged: 1. That Hedrick was the county clerk of Harvey county; 2. "That the City of Wichita, Kansas, has the legal title to certain water pipe lines, pumping equipment, and other appurtenances located in Harvey County, Kansas, but that the beneficial use thereof is in the Wichita Water Company, a private corporation organized for profit. That the City of Wichita, Kansas, purchased and installed said pipe line and other appurtenances located in Harvey County, Kansas, pursuant to a certain agreement with said Wichita Water Company, in connection with a certain franchise, that hereunto attached, marked 'Exhibit A,' is a true and correct copy of Ordinance No. 13-520, which sets forth the agreement or arrangement between said city and said water company."; 3. That under the constitution of the state of Kansas the pipe line and other appurtenances were not exempt from taxation but the defendant had failed to assess them for taxation; 4. That plaintiff had no adequate remedy at law and was entitled to a writ of mandamus directed to the county clerk requiring him to assess the above property for taxation. There was no description of the property other than as shown above.

The copy of the ordinance shows it was enacted November 22, 1942, and granted to The Wichita Water Company, hereafter referred to as the company, a franchise for the purpose of constructing, operating, extending and maintaining a system of waterworks in the city of Wichita for the purpose of supplying and distributing water to the city and the inhabitants thereof for domestic,

commercial, industrial and other uses as well as for the extinguishing of fires, and that the city, during the life of the franchise should deliver to the company at a stated location an adequate supply of water for distribution except under conditions not of present importance and that the company should pay to the city stated rates for the water as well as other fixed charges.

On April 24, 1954, the county clerk filed his answer alleging that the records in his office disclosed that in the year 1941 a described five acres was entered upon the tax rolls as the property of the city of Wichita and was assessed for the years 1941 to 1945 inclusive and on July 6, 1946, the Commission of Revenue and Taxation of the state of Kansas issued an order abating the tax for the reason the property was exempt from taxation and subsequent thereto the property was not again assessed; that he had not placed the property on the assessment rolls for the current year because of the above order and for the further reason the legal title to the property was in the city of Wichita, a city of the firstclass, and, under Art. XI, Sec. 1, of the state constitution and G.S. 1949, 13-1406 and 79-201, the property was exempt from taxation. Other allegations need not be set forth. He prayed the alternative writ be dismissed and he have judgment for costs.

On May 18, 1954, the trial court made its order that the city of Wichita and others be made parties defendant and on June 12, 1954, the city of Wichita filed its motion that the court quash the motion for the alternative writ and the alternative writ issued for reasons which need not be set out in detail but which included that the county clerk was commanded to perform acts beyond the power and scope of his duties, and that no facts were stated showing plaintiff had a clear legal right to require performance of the acts ordered done by the county clerk.

The trial court heard the motion to quash, and after having it under consideration for some time, on August 23, 1954, sustained the motion. In due time the plaintiff, the board of county commissioners and the municipal corporations other than the city of Wichita served notice of appeal.

In this court the appellants have filed a single abstract and a single brief.

Before taking up appellants' contentions of error we note that no defendant has raised any question of the venue of the action insofar as it is concerned. However, as bearing on the question, attention is directed to *Trader v. Southwestern Bell Telephone Co.*, 145 Kan. 600, 66 P. 2d 414, as to venue of actions against a city, and to *Huerter v. Hassig*, 175 Kan. 781, 267 P. 2d 532, as to actions against a state agency.

Appellants premise their argument by directing attention to Art. XI, Section 1, of our state constitution that all property *used exclusively* for municipal purposes shall be exempted from taxation, to G. S. 1949, 79-201, *Seventh*, that all works, machinery and fixtures belonging to any city and *used exclusively* for conveying water to such city shall be exempt from taxation, and to the fourteenth amendment to the constitution of the United States that no state shall deprive any person of property without due process of law nor deny any person within its jurisdiction the equal protection of the law, and by stating the motion to quash is equivalent to a demurrer, citing *Citizens Utilities Co. v. City of Goodland*, 146 Kan. 172, 69 P. 2d 318, and therefore the motion to quash admits all of the allegations of the motion for the writ and the writ, citing *Zinn v. Hill Lumber & Investment Co.*, 176 Kan. 669, 272 P. 2d 1106. Appellants state that the admissions are that title is vested in the city; that the beneficial use is in the company, a private corporation for profit, and the property has not been assessed for taxation, and in another place in their brief,

they state the admission is that the waterworks are used exclusively for the purpose of conveying water to the company. It need not be debated but that a demurrer or other pleading equivalent thereto admits the well pleaded allegations of the pleading attacked for the purpose of determining the sufficiency of the pleading. While a pleading is usually to be liberally construed in favor of the pleader, the whole of it must be considered and where the pleader attaches to his pleading a written instrument on which his allegation rests, he cannot plead at variance with the terms of that instrument or not justified by it (*Wood v. Stewart*, 158 Kan. 729; 150 P. 2d 331). Applying the rule stated, the motion to quash did not admit the pleaded conclusion the beneficial use of the property was in the company and whether that be the case is to be determined from the ordinance and presents a question of law which will be considered later.

Appellants' contentions all are based on their assumption that beneficial use is in the company, and are presented under three general headings: 1. The property is not exempt by statute; 2. The property is not exempt under the constitution; and 3. The exemption violates constitutional provisions.

Preliminary to discussing the appellants' contentions it is noted that the city of Wichita bases its claim for exemption from taxation on two statutes, one pertaining to taxation and providing that all property belonging exclusively to any city shall be exempt from taxation (G.S. 1949, 70-201, *Sixth*), the other pertaining to cities of the first class and providing lands, buildings and other property of such city shall be exempt from taxation (G.S. 1949, 13-1406). Appellants contend that those statutes are unconstitutional in that they do not make the exemption depend upon exclusive use for a public purpose. If, however, the action be disposed of on appellants' contention the property is not exempt under the statute later mentioned and on which they rely, then

the questions of constitutionality of the above mentioned statutes need not be discussed.

Appellants' first contention is that the only statute applicable is G. S. 1949, 79-201, *Seventh*, which provides for exemption from taxation of

> "All works, machinery and fixtures belonging to and owned by any town, city or village, and used exclusively for conveying water to such town, city or village."

and they argue that such statute deals specifically with the tax status of waterworks belonging to a city, and no other statute dealing generally with tax exemption applies, under the rule that where there is a conflict between a statute dealing generally with a subject and another dealing with a specifc phase of it, the specific legislation controls, in support of which they cite *Moody v. Edmondson*, 176 Kan. 116, 269 P. 2d 462. They expand their argument by citing a number of our decisions holding that taxation is the rule, exemption is the exception, and that statutes granting an exemption are strictly construed and those claiming the exemption have the burden of showing clearly that the facts entitle them to the exemption. Those rules were recently restated and adhered to in *Runbeck v. Peterson*, 177 Kan. 314, 279 P. 2d 233, and the cases cited by appellants need not be reviewed.

In support of its contention that the statutes relied upon by it control, the city of Wichita cites *City of Harper v. Fink*, 148 Kan. 278, 80 P. 2d 1080, where application of G. S. 1949, 79-201, *Sixth*, and a counter part of G. S. 1949, 13-1406 being G. S. 1949, 14-1101, were involved and where it was held that under those statutes the test whether real estate belonging to a city was exempt from taxation was ownership and not use. That case, however, did not involve a situation where G. S. 1949, 79-201, *Seventh*, presently relied on by appellants, had application, and that case is not decisive of

appellants' contention that the last mentioned statute controls.

In view of what is later said we need not enter into any discussion of the rule of construction as to general or special legislation. The appellants make no direct contention that the ordinance of the city of Wichita granting a water distributing franchise to the company is illegal or invalid, and when capacity of the present plaintiff to raise the question and the power of the Harvey County district court to decide it even though the water company was a party, and it is not, are considered, it is apparent such indirect contention as is made cannot be ruled on.

It is apparent from the ordinance granting the franchise to the company that the city obligates itself to furnish water at a designated place in Sedgwick County and that the company obligates itself to distribute the water to the city and its inhabitants for domestic, commercial and other uses as well as for the extinguishing of fires. There is nothing in the ordinance indicating from what source the city is to obtain water or that the company has any obligation to or any interest in or right to control any property of the city between the point of delivery of water to it and the place where the city of Wichita may obtain the water. It may not be said that the company has any beneficial interest in the works of the city beyond the point where the water is delivered to the company. For present purposes, we are of the opinion it is of no concern to the appellants how the city distributes the water which it obtains for its uses or whether it may do the same by its own distribution system, if it had or has one, or by contract with someone like the company, for the end result is to supply the city and its inhabitants with water, in itself a legal function under its governmental and police power.

By way of summary we conclude that the motion for the writ and the ordinance attached as a part thereof disclose that The Wichita Water Company had no beneficial interest in the property of the city of Wichita located in Harvey county; that the property, works, machinery and fixtures belonging to the city for conveying water to such city, were used exclusively for that purpose; that under G. S. 1949, 79-201, *Seventh*, such property was exempt from taxation and that the trial court did not err in rendering judgment quashing the motion for the alternative writ of mandamus to compel the county clerk of Harvey county to assess the property for taxation and the alternative writ issued.

The judgment of the trial court is affirmed.

## APPENDIX B.

Judgment of the District Court of Harvey County, Kansas:

### JOURNAL ENTRY.

Now on this 15th day of July, 1954, comes on for hearing the motion of the defendant City of Wichita to quash the motion for alternative writ and the alternative writ filed and issued herein. The plaintiff is present by its attorneys, Kenneth G. Speir and Lelus B. Brown. The defendant Clay Hedrick is present by his attorney Arthur Turner. The defendant Board of County Commissioners of Harvey County, Kansas, is present by its attorneys, Lelus B. Brown and Kenneth G. Speir. The defendant City of Wichita is present by its attorney, Douglas E. Shay. All the rest of the defendants except the State Commission of Revenue and Taxation of the State of Kansas are present by their attorney, J. Rodney Stone. The Court, after the arguments of counsel, takes the matter under advisement and thereafter requests the submission of briefs. And now, on this 23rd day of August, 1954, being fully advised in the premises, the Court, finds that the Motion to Quash should be sustained.

IT IS THEREFORE BY THE COURT ORDERED that the Motion to Quash the motion for alternative writ and the alternative writ be and the same is hereby sustained.

IT IS FURTHER BY THE COURT ORDERED that the costs be taxed to the plaintiff.

NOTE: The only judgment of the Supreme Court of Kansas is contained in the opinion, Appendix A, *supra*, page 23.

## APPENDIX C.

## U. S. CONSTITUTION.

### Amendment 14—RIGHTS AND IMMUNITIES OF CITIZENS

**Note: Proclamation declaring fourteenth amendment ratified dated July 28, 1868. (Kansas ratified previous to date of said proclamation.)**

Section 1. *Citizenship; privileges or immunities; due process clause.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## KANSAS CONSTITUTION.

### Article 11.—FINANCE AND TAXATION

§1. *System of taxation; classification; exemption.* The legislature shall provide for a uniform and equal rate of assessment and taxation, except that mineral products, money, mortgages, notes and other evidence of debt may be classified and taxed uniformly as to class as the legislature shall provide. All property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes, and personal property to the amount of at least two hundred dollars for each family, shall be exempted from taxation.

**Note: The words "except that mineral products, money, mortgages, notes and other evidence of debt may be classified and taxed uniformly as to class as the legislature shall provide," constitute an amendment submitted by the legislature in 1923 (L. 1923, ch. 255) and adopted at the general election November 4, 1924.**

**GENERAL STATUTES OF KANSAS**
**1949, 79-201, page 2535.**

79-201. Property exempt. That the property described in this section, to the extent herein limited, shall be exempt from taxation: *First.* All buildings used exclusively as places of public worship, as public schoolhouses, or both, with the furniture and books therein contained and used exclusively for the accommodation of schools and religious meetings, together with the grounds owned thereby, not exceeding in any one case ten acres, if not leased or otherwise used with a view to profit; and also any parsonage or dwelling owned by any church society, whether said society be a local or a district or the general organization of such church, and occupied as a residence by a pastor of such local church society, or a regularly ordained minister of such district or general church society, and which pastor or minister is regularly engaged in conducting the services and in the ministrations of such church society in the churches thereof throughout such local district or general church area, within the state of Kansas, together with the ground on which it is situated, not exceeding in any one case one-half acre; and all that portion of any building and the ground upon which such building stands, belonging to any literary, educational, scientific, religious, benevolent or charitable corporation, organization or society, situated under any lodge, audience or assembly room used by such corporation, organization or society, or the ante-chambers, halls, passages or other compartments designed for and used as appurtenances of such lodge, audience or assembly room, as well as said rooms and appurtenances, shall be wholly exempt from taxation when the portion of said building so situated is leased or rented for legitimate purposes, and the net rents or earnings thereof are applied exclusively to literary, educational, scientific, religious, benevolent or charitable purposes. *Second.* All lands used exclusively as graveyards. *Third.* All buildings and parts of buildings belonging to scientific, liter-

ary and benevolent associations, used exclusively for scientific, literary or benevolent purposes, together with lands, not exceeding five acres, owned and occupied by such institutions and attached thereto, if not leased or otherwise used with a view to profit; and all books, papers, furniture, apparatus and instruments belonging to such associations, and used exclusively for scientific, literary and benevolent purposes. *Fourth.* All moneys and credits belonging exclusively to universities, colleges, academies or other public schools of any kind, or to religious, literary, scientific or benevolent and charitable institutions or associations, appropriated solely to sustain such institutions or associations, not exceeding in amount or in income arising therefrom the limit prescribed by the charter of such institution or association. *Fifth.* All property belonging exclusively to this state or to the United States. *Sixth.* All property belonging exclusively to any county, city, town or school district, except lands bid off for counties or cities at tax sales. *Seventh.* All works, machinery and fixtures belonging to and owned by any town, city or village, and used exclusively for conveying water to such town, city or village. *Eighth.* All fire engines and other implements used for the extinguishment of fires, with the buildings used exclusively for the safekeeping thereof, and for the meeting of fire companies, whether belonging to any town, city or village, or to any fire company organized therein. *Ninth.* Personal property to the amount of two hundred dollars for each family: *Provided,* That when a family has once become entitled to this exemption, the right thereto shall exist so long as any member of the original family survives and maintains a home. *Tenth.* The wearing apparel of every person. *Eleventh.* All public libraries. *Twelfth.* Family liabraries and schoolbooks of every person and family not exceeding in value in any one case of fifty dollars. *Thirteenth.* The reserve or emergency funds of fraternal beneficiary societies authorized to do business under the laws of the state of Kansas.

## APPENDIX D.

### OFFICE OF SECRETARY OF STATE

TOPEKA, KANSAS

PAUL R. SHANAHAN
SECRETARY OF STATE

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

I, PAUL R. SHANAHAN, Secretary of State of the State of Kansas, do hereby certify that the official files and records in the office of the Secretary of State of the State of Kansas show that the Kansas legislature, meeting during the regular Session of 1913, adopted Senate Concurrent Resolution No. 4, said resolution being published in the Kansas Session Laws of 1913 as Chapter 335, Laws of Kansas, 1913, with the context of the resolution appearing as follows:

A PROPOSITION to amend sections 1 and 2 of article 11 of the constitution of the state of Kansas, relative to finance and taxation.

Be it Resolved by the Legislature of the State of Kansas, two-thirds of the members elected to each House thereof concurring therein.

SECTION 1. The following proposition to amend the constitution of the state of Kansas is hereby submitted to the qualified electors of the state for their approval or rejection: That sections 1 and 2, article 11, be amended to read as follows:

Section 1. *The legislature shall have power to establish and maintain an equitable system for raising state and local revenue,* and may classify the subjects of taxation so far as their differences justify the same, in order to secure a just return from each. All property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes, and personal

property to the amount of at least two hundred dollars for each family, shall be exempted from taxation. Taxes may also be imposed on incomes, franchises, privileges and occupations, which taxes may be graduated and progressive, *and reasonable exemption may be provided.*

SEC. 2. This proposition shall be submitted to the electors of the state at the general election in the year 1914 for their approval or rejection. The amendment hereby proposed shall be designated on the ballot by the following title: "The tax amendment to the constitution," and shall be voted for or against as provided by law under such title.

SEC. 3. This resolution shall take effect and be in force from and after its publication in the statute book.

Approved March 10, 1913.

I further certify that the official files and records in the office of the Secretary of State of the State of Kansas show that the Kansas legislature, meeting during the regular session of 1919, adopted House Concurrent Resolution No. 37, said resolution being published in the Kansas Session Laws of 1919 as Chapter 335, Laws of Kansas, 1919, with the context of the resolution appearing as follows:

A PROPOSITION to amend sections 1 and 2 of article 11 of the constitution of the state of Kansas relative to finance and taxation.

Be it resolved by the Legislature of the State of Kansas, two-thirds of the members elected to each House thereof concurring therein:

SECTION 1. The following proposition to amend the constitution of the state of Kansas is hereby submitted to the qualified electors of the state for their approval or rejection: That sections 1 and 2, article 11, be amended in one section to read as fol-

lows: "Section 1. *The legislature shall have power to establish and maintain a just and equitable system for raising state and local revenue,* and may classify the subjects of taxation in order to secure a just return therefrom *and may exempt property when the public welfare will be benefited thereby;* but, all property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes, and personal property to the amount of at least two hundred dollars for each family, shall be exempted from taxation."

SEC. 2. This proposition shall be submitted to the electors of the state at the general election in the year 1920 for their approval or rejection. The amendment hereby proposed shall be designated on the ballot by the following title: "The tax amendment to the constitution," and shall be voted for or against as provided by law under such title.

SEC. 3. This resolution shall take effect and be in force from and after its publication in the statute book.

Approved March 11, 1919.

I further certify that the records show that the proposition set forth in Chapter 335, Laws of Kansas, 1913, was considered and voted upon at the General Election of 1914 *with the election results showing the proposition to be rejected* by the following vote: For—156,969. Against—166,800.

I further certify that the records show that the proposition set forth in Chapter 335, Laws of Kansas, 1919, was considered and voted upon at the General Election of 1920 with *the election results showing the proposition to be rejected* by the following vote: For—170,710. Against—218,931.

IN TESTIMONY WHEREOF:
I hereto set my hand and cause to be affixed my official seal. Done at the City of Topeka, this seventh day of September, A. D. 1955.

(SEAL)

/s/ Paul R. Shanahan
PAUL R. SHANAHAN,
SECRETARY OF STATE.

(EMPHASIS SUPPLIED by Appellants)

OCT 25 1955
HAROLD B. WILLEY, Clerk

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

## No. 433.

THE STATE OF KANSAS, EX REL. LELUS B. BROWN, COUNTY ATTORNEY OF HARVEY COUNTY, KANSAS, THE BOARD OF COUNTY COMMISSIONERS OF HARVEY COUNTY, KANSAS; HALSTEAD TOWNSHIP OF HARVEY COUNTY, KANSAS; LAKIN TOWNSHIP OF HARVEY COUNTY, KANSAS; HALSTEAD COMMON SCHOOL DISTRICT NO. 52 OF HALSTEAD, KANSAS; RURAL HIGH SCHOOL DISTRICT NO. 1 OF HALSTEAD, KANSAS; BENTLEY PUBLIC SCHOOL DISTRICT NO. 185, JOINT, OF BENTLEY, KANSAS; and VALLEY CENTER TOWNSHIP OF SEDGWICK COUNTY, KANSAS, *Appellants*,

vs.

CLAY HEDRICK, AS COUNTY CLERK OF HARVEY COUNTY, KANSAS; THE STATE COMMISSION OF REVENUE AND TAXATION OF THE STATE OF KANSAS; AND THE CITY OF WICHITA, KANSAS, *Appellees*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

**MOTION TO DISMISS.**

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

## No. 433.

THE STATE OF KANSAS, EX REL. LELUS B. BROWN, COUNTY ATTORNEY OF HARVEY COUNTY, KANSAS, THE BOARD OF COUNTY COMMISSIONERS OF HARVEY COUNTY, KANSAS; HALSTEAD TOWNSHIP OF HARVEY COUNTY, KANSAS; LAKIN TOWNSHIP OF HARVEY COUNTY, KANSAS; HALSTEAD COMMON SCHOOL DISTRICT NO. 52 OF HALSTEAD, KANSAS; RURAL HIGH SCHOOL DISTRICT NO. 1 OF HALSTEAD, KANSAS; BENTLEY PUBLIC SCHOOL DISTRICT NO. 185, JOINT, OF BENTLEY, KANSAS; and VALLEY CENTER TOWNSHIP OF SEDGWICK COUNTY, KANSAS, *Appellants,*

VS.

CLAY HEDRICK, AS COUNTY CLERK OF HARVEY COUNTY, KANSAS; THE STATE COMMISSION OF REVENUE AND TAXATION OF THE STATE OF KANSAS; AND THE CITY OF WICHITA, KANSAS, *Appellees.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

### MOTION TO DISMISS.

Appellee, the City of Wichita, Kansas, moves to dismiss this appeal on the grounds that it does not present

any Federal question and that the judgment of the Supreme Court of the State of Kansas, sought to be reviewed, is based exclusively on an adequate non-federal ground.

## STATUTES AND ORDINANCES INVOLVED.

28 U. S. C. 1257 (2) and (3) reads:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
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> * * * * * * *
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
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> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Sections 79-201 *Sixth* and *Seventh* and Section 13-1406 of the General Statutes of Kansas, 1949, read as follows:

> "79-201. *Property Exempt.* That the property described in this section, to the extent herein limited, shall be exempt from taxation:
>
> * * * * * * *
>
> "*Sixth.* All property belonging exclusively to any county, city, town or school district, except lands bid off for counties or cities at tax sales.

"*Seventh.* All works, machinery and fixtures belonging and owned by any town, city or village, and used exclusively for conveying water to such town, city or village."

"13-406. *Exemptions of Property.* Lands, buildings, money, debts due the city and all other property and assets belonging to the city shall be exempt from taxation, execution, and sale."

Ordinance No. 13-520 finally passed and adopted by the City of Wichita, Kansas, on November 2, 1942, entitled

"An Ordinance Granting to the Wichita Water Company, Its Successors and Assigns, the Right and a Franchise to Operate and Maintain a System of Waterworks in the City of Wichita, Kansas, for the Purpose of Supplying and Distributing Water to Said City and Vicinity and Environs and the Inhabitants Thereof, Prescribing the Terms of Said Grant and Relating Thereto."[1]

## STATEMENT.

Appellee, the City of Wichita, Kansas, is located in Sedgwick County and since 1940 has owned and been in possession of certain water lines, pumping equipment and appurtenances located in the adjoining county of Harvey, fifteen to twenty miles north of the limits of the City of Wichita. Said water lines, pumping equipment and other appurtenances are exclusively used by the City of Wichita in conveying water to the City for use by its inhabitants. The water so conveyed to the City is distributed to the inhabitants by The Wichita Water Company, a privately owned public utility, under a franchise from the

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[1]The material portions of this Ordinance are set forth verbatim in Appendix B, *infra*, Page A3.

city, being Ordinance No. 13-520, a copy of which is set out in Appendix B, *infra*, Page A3.

On April 19, 1954, appellant Lelus B. Brown, County Attorney of Harvey County, Kansas, filed in the District Court of that county a motion for writ of mandamus to compel the County Clerk of Harvey County to assess and levy taxes on the water lines, pumping equipment and appurtenances owned by the City of Wichita and located in that county. The motion for writ of mandamus, a copy of which is printed in Appendix A, *infra*, Page A1, alleged that by virtue of the franchise ordinance No. 13-520 between the City of Wichita and The Wichita Water Company, the beneficial use of said water lines and supply equipment was vested in The Wichita Water Company and therefore not exempt from taxation by Harvey County. This allegation was the only ground asserted in support of the relief sought. The same ground was likewise set out in the answers of other appellants.

On August 23, 1954, the District Court of Harvey County, Kansas, sustained the motion of appellee, the City of Wichita, Kansas, to quash the alternative writ of mandamus that had issued. Appellants appealed such order of the District Court of Harvey County to the Supreme Court of the State of Kansas. The latter court on May 7, 1955, affirmed the ruling of the trial court in quashing the alternative writ of mandamus and found that the Wichita Water Company had no beneficial interest in said water lines and supply equipment and that such water lines and equipment were used exclusively by the City of Wichita, Kansas, for the conveyance of water to the City for use by its inhabitants. On September 26, 1955, appellants filed their notice of appeal from said decision in this Court along with their jurisdictional statement under Section 28, U. S. C. 1257 (2) (3).

## ARGUMENT.

### No Federal Question Involved.

This court has no jurisdiction to review, by way of appeal or certiorari, the judgment of the Supreme Court of Kansas entered in this case unless the validity of a Kansas statute has been "drawn in question" on the ground of its being repugnant to the Constitution of the United States.[2] There is no allegation contained in the motion for writ of mandamus or in the answers of appellants that any Kansas statute is invalid on the ground that it is repugnant to the Constitution of the United States. Although the motions and answers of appellants have been designated as a part of the record, those pleadings are set forth for the court's convenience in Appendix C, *infra*, Page A9.

When the case reached the Supreme Court of the State of Kansas, appellants departed from the allegations of their pleadings and asserted for the first time the unconstitutionality of two Kansas statutes, namely, G. S. 1949, Section 79-201, *Sixth*, and Section 13-1406. The texts of those statutes are set forth *supra*. The Kansas Supreme Court, however, expressly refrained from considering or passing upon the constitutionality of either of these statutes. Its decision was based solely upon the following factual determination:

> "By way of summary we conclude that the motion for the writ and the ordinance attached as a part thereof disclose that The Wichita Water Company had no beneficial interest in the property of the city of

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[2]28 U. S. C. 1257 (2) (3).

> Wichita located in Harvey county; that the property, works, machinery and fixtures belonging to the city for conveying water to such city, were used exclusively for that purpose; that under G. S. 1949, 79-201, Seventh, such property was exempt from taxation and that the trial court did not err in rendering judgment quashing the motion for the alternative writ of mandamus to compel the county clerk of Harvey county to assess the property for taxation and the alternative writ issued."[3]

The validity and constitutionality of G. S. 1949, 79-201, *Seventh*, was never challenged by appellants at any stage of the proceedings. The state court's decision was factual in nature, consisting of an interpretation and construction of the franchise ordinance. Once having determined that *in fact* the water supply equipment was *used* for a public purpose such property was clearly exempt from taxation under the wording of G. S. 1949, 79-201, *Seventh*, and there was no occasion to consider the validity of any other Kansas statute on the ground that it was repugnant to the Constitution of the United States.

The jurisdictional statement filed by appellants clearly discloses that the validity of G. S. 1949, 79-201, *Seventh*, is not questioned on the ground that it is repugnant to the 14th Amendment of the Constitution of the United States. The very wording by appellants in their jurisdictional statement of their "Questions Presented" makes it clear that their complaint lies in the fact that such statute has been incorrectly *construed*. In other words, they contend that the decision and judgment of the Kansas Supreme Court is subject to appeal to this Court, not because the

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[3]See decision of Supreme Court of the State of Kansas in *State ex rel.* v. *Hedrick* printed at Appendix A of appellants' jurisdictional statement, Page 23.

Kansas tax exemption statute is repugnant to the Federal Constitution, but because the Kansas Supreme Court incorrectly found as a matter of fact that the city of Wichita's property in question fell within the wording of the statutory exemption.

This Court has long held that with respect to the construction of state statutes that the state court's views are completely non-reviewable.[4] Jurisdiction should not be here asserted merely to review the decision by the Kansas Supreme Court upon a question of fact, namely, that the property, works, machinery and fixtures belonging to the city and conveying water to such city, were used exclusively for that purpose (see language *supra*). It is not the function of this court merely to give the defeated party of the state court another hearing and in such hearing to re-examine the state court's findings and conclusions of fact. The function of this court is to secure federal rights.

**Non-Federal Ground Adequate to Support State Court Judgment.**

This court has consistently adhered to the principle that it will not review a state court judgment based upon an adequate and independent non-federal ground, even though a Federal question be involved and perhaps wrongly decided.[5] As stated in *Herb* v. *Pitcairn*, 324 U. S. 117, 125-6:

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[4]*Portland R. Co.* v. *Railroad Commission*, 229 U. S. 397, 412; *Grayson* v. *Harris*, 267 U. S. 352, 358; *Fry Roofing Co.* v. *Wood*, 344 U. S. 157, 160.

[5]*Murdock* v. *Memphis*, 20 Wall. 590, 636; *Berea College* v. *Kentucky*, 211 U. S. 45, 53; *Fox Film Corp.* v. *Muller*, 296 U. S. 207; Supreme Court Practice, 2nd Edition, 1954, by Robert L. Stern and Eugene Gressman.

> "The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the relations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion."

In its decision the Kansas Supreme Court merely found that the property, works, machinery and fixtures belonging to the city and conveying water to such city, were *used exclusively* for that purpose. The court based its conclusion upon the allegations contained in appellants' motion for writ of mandamus and the franchise ordinance attached as a part thereof. Sections G. S. 1949, 79-201, Seventh, exempts

> "all works, machinery and fixtures belonging to and owned by any town, city or village, and *used exclusively* for conveying water to such town, city or village" (Emphasis supplied).

Therefore, the City's property used for that purpose is exempt from taxation. There is no important question of Federal law to decide. There is no Kansas statute repugnant to the 14th Amendment of the Constitution of the United States. The decision of the Kansas court is clear, simple and concise. It is solely based on a non-federal ground that is entirely adequate to support the judgment. In fact it is difficult to imagine how any Federal question could be involved or even relevant to the decision.

This court's decisions cited by appellants on pages 3 and 4 of their Jurisdictional Statement cannot support the jurisdiction of the court in this case where the validity of a Kansas statute has not been drawn in question. In fact *Jet Bros. Distilling Co.* v. *Carrollton*, 262 U. S. 1, cited by appellants, clearly holds that a mere objection to an exercise of authority under a state statute whose validity is not attacked cannot be made the basis of a writ of error to this court. Appellee does not take exception to the general principles of law quoted by appellants from other decisions of this court in the Jurisdictional Statement, pages 13 through 21. Such principles of law, however, cannot be applied to the facts of the instant case.

## CONCLUSION.

We respectfully submit, therefore, that the appellants present no Federal question for the decision of this court and that their appeal should be dismissed.

ROBT. B. MORTON,
303 South Main,
Wichita, Kansas,

PAUL J. DONALDSON,
344 South Broadway,
Wichita, Kansas,

DOUGLAS E. SHAY,
728 Beacon Building,
Wichita, Kansas,

*Counsel for Appellee, The City of Wichita, Kansas.*

October ____, 1955.

## APPENDIX A.

### Motion for Writ of Mandamus.

Comes now the State of Kansas on the relation of Lelus B. Brown, the duly elected, qualified, and acting County Attorney of Harvey County, Kansas, and respectfully shows to the Court:

(1) That Clay Hedrick is the duly appointed, qualified, and acting County Clerk of Harvey County, Kansas.

(2) That the City of Wichita, Kansas, has the legal title to certain water pipe lines, pumping equipment, and other appurtenances located in Harvey County, Kansas, but that the beneficial use thereof is in the Wichita Water Company, a private corporation organized for profit.

That the City of Wichita, Kansas, purchased and installed said pipe line and other appurtenances located in Harvey County, Kansas, pursuant to a certain agreement with said Wichita Water Company in connection with a certain franchise, that hereunto attached, marked "Exhibit A," is a true and correct copy of Ordinance No. 13-520, which sets forth the agreement or arrangement between said city and said water company.

(3) That under the Constitution of the State of Kansas, said pipe line and other appurtenances are not exempt from taxation; however, the defendant and his predecessors in office have failed and neglected to assess said pipe line and appurtenances for taxation.

(4) That plaintiff has no adequate remedy at law and is therefore entitled to a Writ of Mandamus from this Court directed to Clay Hedrick, as County Clerk of Harvey

County, Kansas, requiring him to assess said pipe line and other appurtenances in Harvey County, Kansas, the legal title to which is in the City of Wichita, Kansas, and further requiring him to assess and tax said properties for prior years.

WHEREFORE, premises considered, plaintiff respectfully moves and prays this Court to issue a Writ of Mandamus directed to Clay Hedrick, as County Clerk of Harvey County, Kansas, commanding him to assess said property for taxation for the current and prior years according to law.

LELUS B. BROWN,
County Attorney of Harvey County, Kansas.

KENNETH G. SPEIR,
Special Assistant to Said County Attorney.

STATE OF KANSAS, COUNTY OF HARVEY, SS.

Lelus B. Brown, of lawful age and being first duly sworn upon oath, states:

That he is the duly elected, qualified, and acting County Attorney of Harvey County, Kansas; that he has read and understands the above and foregoing Motion for Writ of Mandamus; and that the facts and statements therein contained are true and correct as he is informed and verily believes.

LELUS B. BROWN

Subscribed and sworn to before me this 14th day of April, 1954.

Mildred Thudin,
Notary Public.

(SEAL)

Comm. exp. Feb. 11, 1957.

## APPENDIX B.

### Exhibit "A."

Published in Wichita Eagle on November 5, November 12th and November 19, 1942.

ORDINANCE NO. 13-520

AN ORDINANCE GRANTING TO THE WICHITA WATER COMPANY, ITS SUCCESSORS AND ASSIGNS, THE RIGHT AND A FRANCHISE TO OPERATE AND MAINTAIN A SYSTEM OF WATERWORKS IN THE CITY OF WICHITA, KANSAS, FOR THE PURPOSE OF SUPPLYING AND DISTRIBUTING WATER TO SAID CITY AND VICINITY AND ENVIRONS AND THE INHABITANTS THEREOF, PRESCRIBING THE TERMS OF SAID GRANT AND RELATING THERETO.

(Only the material portions of the following Ordinance are abstracted herein.)

BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF WICHITA, KANSAS:

SECTION 1. That The Wichita Water Company, a corporation, its successors and assigns, be and it is hereby granted the right and a franchise for the purpose of constructing, operating, extending and maintaining and continuing to operate and maintain a system of waterworks in the City of Wichita, Kansas, for the purpose of supplying and distributing water to said City and vicinity and environs and the inhabitants thereof for domestic, commercial, industrial and other uses, as well as for the extinguishing of fires, and subject to the limitations herein stated, said The Wichita Water Company, (hereinafter

designated as the "Grantee") is granted permission to use such portions of the streets, alleys, avenues, parkways, boulevards and other public grounds of the City of Wichita, as are now used and as may be necessary for the purpose of constructing, operating, extending and maintaining a system of waterworks for the purpose aforesaid.

PROVIDED, that the use of the said streets, alleys, avenues, parkways, boulevards and other public grounds shall at all times be subject to the right of the City of Wichita under the law to make reasonable rules and regulations relating to the manner of such use and said "Grantee" shall never unreasonably interfere with the other proper uses of said streets, alleys, avenues, parkways, boulevards and other public grounds.

SECTION 2. . . . .

SECTION 3. . . . .

SECTION 4. The City, shall during the life of this franchise, deliver to the Grantee, for distribution by it hereunder, an adequate supply of water at all times except when prohibited by unforeseen breaks or other emergencies beyond the City's control, delivering said water into reservoirs or pumping station of the grantee on Waterworks Island. Provided, however, that in case of temporary discontinuance or inadequacy of the City's said supply of water from any cause, the Grantee shall operate any or all of its then existing wells as may be required to maintain the service. Said water thus to be supplied by the City as well as water supplied by the Grantee from its own sources of supply shall at all times conform in quality with such requirements as may be from time to time established for interstate carriers by the United States Public Health Service. Grantee shall at all times maintain its present well system for emer-

gency use and to augment the supply of water delivered by the City to the Grantee in case of inadequacy.

Commencing with the delivery of said water by the City to the Grantee under this franchise, the Grantee will pay to the City $10.00 per million gallons of water for all water so delivered by the City into the reservoir of the Grantee or to its pumping station located on what is known as Waterworks Island. . . . . .

In addition the Grantee shall pay to the City at the rate of Six Hundred Fifteen Dollars ($615.00) per month commencing with the effective date of this Franchise, said payment to be made on the fifteenth secular day of every calendar month for the preceding month. Said monthly sum of Six Hundred Fifteen Dollars ($615.00) represents the estimated net savings in operating expenses through the distribution of water so supplied by the City as compared with the distribution of water from the Grantee's own facilities. Said sums so paid shall be considered as sums paid for water produced and furnished by the City.

In the event of failure or failures of the City's water supply facilities so as to require Grantee to operate its own wells for an aggregate of more than fifteen days per annum, then the monthly payments of Six Hundred Fifteen Dollars ($615.00) as aforesaid shall be abated proportionately for the number of days in excess of fifteen that the Grantee is required to operate its wells. Each of the parties hereto pledges its cooperation with the other in carrying forward the operations provided for in this Franchise in such manner as to best promote the public interest.

SECTION 5. All water service shall be by meter measurement except for extinguishment of fires, and except as herein otherwise provided, which shall be governed by contract between "Grantee" and the consumer, subject to

the regulatory jurisdiction of the City, or such other body as may hereafter have jurisdiction over the rules, practices and standard of service of the "Grantee" as may from time to time exist.

SECTION 6. Until such time as they are changed by the Board of Commissioners of the City of Wichita, or such body or tribunal as shall have jurisdiction thereover, the present regular schedule of meter rates now in effect shall apply and is as follows: * * *.

SECTION 7. . . . .

SECTION 8. The Grantee agrees to add to its own rates and all bills rendered to its consumers, except the City of Wichita and its departments, and to collect for the City (where it may reasonably be done without litigation) upon all amounts collected for itself, until the further ordinances of the City, a surcharge as follows:

(a) To all consumers using water within the City of Wichita and to all industrial consumers as defined by Paragraph (a) on Page 115 of a book on file in the Water Company's office, entitled "Instructions as to the Use of the Uniform System of Account for Water Utilities Adopted by the National Association of Railroad and Utility Commissioners, including Supplemental Explanation and Additional Sub-accounts," fifteen per cent (15%);

(b) To all other consumers, thirty per cent (30%)—calculated on the basis of the regularly established rates in the City of Wichita.

All the money so collected by the Grantee for the City under the above provisions, during each calendar month, shall be remitted to the City of Wichita on or before the 15th secular day of the following calendar month.

The City shall have the option at any time to change the foregoing surcharges, or any of them, by the enactment of an ordinance, and such surcharge or surcharges as is put into effect by such ordinance shall be collected by the Grantee as is herein provided.

. . . .

SECTION 9. . . . .

SECTION 10. The Grantee will accept a basic amount of Two Hundred Twenty-Five Thousand Dollars ($225,000.00) per year as the gross income available as a return for its property as it existed December 31, 1941. The amount of $225,000.00 available for a return is defined as the gross operating revenue Grantee receives and retains from its water customers less operating expenses, maintenance, taxes, and a basic amount for depreciation of Forty-Five Thousand Dollars ($45,000.00) per annum predicated upon the depreciable property as same existed as of December 31, 1941. The Grantee shall be entitled to receive as a return on its property for each year beginning January 1, 1943, the amount of $225,000.00 plus six (6) per cent return and one (1) per cent for depreciation on the cost of all betterments and replacements less the cost of all property abandoned, from and after December 31, 1941, and less six (6) per cent each year on the amount by which the depreciation reserve exceeds the depreciation reserve as shown by the Balance Sheet of the Grantee as of December 31, 1942, it being understood that for the purpose of calculating the balance upon which said six (6) per cent last mentioned is to be computed, no deductions shall be considered from the depreciation reserve, except the cost of all property abandoned and the cost of abandoning such property less its salvage value. *If during any calendar year beginning with the calendar year 1943 during the effective period of this franchise, the said gross income of the*

*Grantee is more than $225,000.00 plus six per cent return and one per cent for depreciation on the net cost of betterments and less six per cent (6%) per annum on the increase in the depreciation reserve, as aforesaid, then the Grantee will pay to the City for water delivered to it, in addition to $10.00 per million gallons, an amount equal to one-half of such difference, such additional payment to the City for water to be paid annually within one hundred twenty (120) days after December thirty-first of each calendar year.* (Emphasis supplied.)

The Grantee shall make a report annually to the City on or before April 1st of each year, commencing April 1, 1944, showing for the previous calendar year gross revenues and operating expenses, maintenance, taxes and accruing depreciation in accordance with the classification of accounts used by the Grantee. The Grantee shall also concurrently furnish the City with a statement showing the cost of all betterments and replacements and the cost of all property abandoned from and after December 31, 1941, together with the increase or decrease, as the case may be, in the depreciation reserve from and after December 31, 1942.

The Grantee agrees that the aggregate management charges paid by it under the present or any similar management contract for present or similar services rendered or to be rendered Grantee by any other party or agency and charged as an operating expense of the Grantee, shall not exceed the percentage paid by other water companies in the same affiliated group under similar contracts and shall at no time exceed four per cent (4%) of the gross operating revenues of the Grantee for any calendar year.

SECTION 11 to SECTION 26 inclusive . . . .

This ordinance was duly passed by the Board of Commissioners after a third reading thereof at a third weekly meeting of the Board of Commissioners of the City of Wichita, being finally passed and adopted upon the 22nd day of November, 1942.

/s/ O. F. SULLIVAN,
Mayor

ATTEST: /s/ C. C. Ellis, City Clerk.

## APPENDIX C.

Filed April 24, 1954.

### Answer.

Comes now the defendant Clay E. Hedrick as County Clerk of Harvey County, Kansas and for his answer to the plaintiff's Alternative Writ of Mandamus and the motion therefore, filed herein in the above entitled matter alleges and states:

THAT said writ and a copy of said motion was served upon him by one of the plaintiff's attorneys, Kenneth G. Speir on the 20th day of April, 1954, and said writ is returned herewith.

THAT said defendant was regularly appointed to serve the unexpired term of the duly elected County Clerk of Harvey County, Kansas and on January 1, 1954 said defendant was duly qualified for said office and assumed the duties thereof and is now the acting County Clerk of said county.

THAT, the records of the defendant's office disclose that in the year 1941, the following described real estate situated in Harvey County, Kansas, to wit:

> Five (5) acres in square form in the Northwest corner of the Northwest Quarter (NW¼) of Section Sixteen (16), Township Twenty-four (24) South, Range Two (2) West of the 6th P. M.

was entered upon the tax rolls as the property of the City of Wichita, Kansas; that said real estate was assessed for taxes in the years 1941, 1942, 1943, 1945; that on the 6th day of July, 1946, an order was issued by the Commission

of Revenue and Taxation of the State of Kansas, order No. 355, abating the tax so assessed for the reason that said real estate was exempt property under the constitution and laws of the State of Kansas; that subsequent to said order, the defendant's predecessors in office did not again assess the real estate, personal property, or leasehold interests, belonging to said City and situated in Harvey County, Kansas.

THAT said defendant has not placed any of said property upon the assessment rolls of Harvey County, Kansas, for the current year because of said order, and further for the reason that the legal title to said property is in the City of Wichita a municipality of the State of Kansas and a city of the first class, and therefore under the provisions of Article Eleven (11), Section One (1) of the Constitution of Kansas and Sections 13-1406 and 79-201 of the General Statutes of Kansas of 1949 said property is exempt from taxation.

THAT Section 79-201, above said, provides, in part, as follows:

> "79-201. Property Exempt. That the property described in this section, to the extent herein limited, shall be exempt from taxation . . . *Sixth.* All property belonging exclusively to any . . . city, town . . . *Seventh,* All works, machinery and fixtures belonging to and owned by any town, city or village, and used exclusively for conveying water to such town, city or village . . . "

THAT said defendant does not admit or deny the allegations, averments and statements of fact contained in the plaintiff's motion for said writ except as may be herein specifically admitted or denied, but does allege that plaintiff should be required to make strict proof of such allegations, averments and statements of fact, including a specific

description of the property of the City of Wichita, Kansas which plaintiff alleges is subject to taxation and further that said defendant shall abide by the judicial determination of the court.

WHEREFORE, the defendant prays that the Alternative Writ of Mandamus filed herein be dismissed and the defendant have his costs herein.

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**Alternative Writ of Mandamus.**

WHEREAS, it is made to appear to the Court by the application of plaintiff on file in the office of the Clerk of this Court that Clay Hedrick, as County Clerk of Harvey County, Kansas, and his predecessors in office have not assessed certain pipe lines and other appurtenances in Harvey County, Kansas, the legal title to which is in the City of Wichita, Kansas; and,

WHEREAS, it further appears from said petition that said property is not exempt from taxation.

NOW, THEREFORE, in order that full and speedy justice may and shall be done in the premises, you, Clay Hedrick, as County Clerk of Harvey County, Kansas, are hereby commanded and enjoined within the next ten days from receipt of this Writ to assess said pipe lines and other appurtenances thereto in Harvey County, Kansas, the legal title to which is in the City of Wichita, Kansas, or show cause why you have not done so.

WITNESS MY HAND and the seal of said Court at Newton, Kansas, this 19th day of April, 1954.

MABEL A. McMULLEN,

(SEAL)

Clerk of the District Court
of Harvey County, Kansas.

The foregoing Writ allowed this 19th day of April, 1954.

ALFRED G. SCHROEDER,
Judge of the District Court
of Harvey County, Kansas.

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Filed April 29, 1954.

**Answer of Defendant, the State Commission of Revenue and Taxation of the State of Kansas.**

Comes now the State Commission of Revenue and Taxation of the State of Kansas, having been made a party defendant herein, and having been ordered by the Court to appear and properly plead, and for its answer to the alternative writ of mandamus and the motion therefor, filed in the above matter, alleges and states:

That, on the 2nd day of July, 1946, after proper hearing and after recommendation by the County Clerk of Harvey County, this Commission entered its order finding that the following described property situated in Harvey County, Kansas:

> Five (5) acres in square form in the Northwest corner of the Northwest Quarter (NW¼) of Section Sixteen (16) Township Twenty-four (24) South,
>
> Range Two (2) West of the Sixth (6th) P. M.,

and owned by the City of Wichita, was exempt from the payment of real estate taxes;

That said order was based upon the evidence presented to this Commission at that time, and there has been no showing that said property is not now owned by the City of Wichita.

Wherefore the defendant, the State Commission of Revenue and Taxation of the State of Kansas, prays that the plaintiff be required to offer strict proof and show to the Court conclusively that said property is not exempt under the Laws of the State of Kansas.

And defendant further prays that the alternative writ of mandamus filed herein be dismissed as to this defendant, and that the defendant have and recover its costs herein.

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Filed May 20, 1954.

**Answer of Defendant Board of County Commissioners of Harvey County, Kansas.**

Comes now the Board of County Commissioners of Harvey County, Kansas by Lelus B. Brown, the duly elected and acting County Attorney of Harvey County, Kansas and, as such, the official attorney for said Board, and Kenneth G. Speir, special assistant to said county attorney for the purposes of this case, all of Newton, Kansas, and for answer to the Motion for Writ of Mandamus and the Alternative Writ of Mandamus, specifically admits each and every allegation in said motion contained, and affirmatively alleges:

(1) That the facts and statements set forth in said motion are hereby adopted by this answering defendant as its answer herein.

(2) That this answering defendant specifically alleges that all of the water pipelines, pumping equipment, and other appurtenances located in Harvey County, Kansas, the legal title to which is in the City of Wichita, Kansas, is and has been subject to assessment and taxation at all times; that this answering defendant is especially

interested in the subject matter hereof for the reason that it has taxing jurisdiction over all taxable property lying within Harvey County, Kansas; and the defendant, Clay Hedrick, as County Clerk of Harvey County, Kansas should be ordered, directed, and compelled to assess all of said property, the legal title to which is in the City of Wichita, Kansas, for taxation and to place the same upon the tax rolls, not only for current and future tax years, but also for past years as "escape" property.

WHEREFORE, this answering defendant respectfully moves and prays this Court to issue a peremptory Writ of Mandamus to Clay Hedrick as the County Clerk of Harvey County, Kansas, commanding him to assess said property for taxation for current, future, and prior years according to law.

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Filed June 9, 1954.

**Reply to Answer of Defendant Board of County Commissioners of Harvey County, Kansas.**

Comes now Clay Hedrick as the duly appointed authorized Clerk of Harvey County, Kansas and for his reply to the Answer of the Defendant, the Board of County Commissioners of Harvey County, Kansas, filed herein, alleges and states:

THAT this defendant as County Clerk of Harvey County, Kansas has in the past and shall in the future take all necessary action to expediently place upon the tax rolls of Harvey County, Kansas all property therein located which should properly appear upon the tax rolls of said county.

THAT the property referred to in the Answer of the Defendant, the Board of County Commissioners of Harvey

County, Kansas has not been placed upon the tax rolls of the said county, or assessed for taxation purposes for the reason set out in the Answer of Clay Hedrick, County Clerk of Harvey County, Kansas, as heretofore filed herein to the plaintiff's Alternative Writ of Mandamus and the motion filed in support thereof.

WHEREFORE, the defendant, Clay E. Hedrick, County Clerk of Harvey County, Kansas prays that the defendant, the Board of County Commissioners of Harvey County, Kansas request for a peremptory Writ of Mandamus be dismissed and that said defendant have his costs herein.

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Filed June 23, 1954.

**Answer.**

Comes now Lakin Township and Halstead Township of Harvey County, Kansas, by their attorney, J. Rodney Stone, of Newton, Kansas, and for their answers herein state:

That these defendants are legally constituted and existing Townships of Harvey County, Kansas, and as such are each authorized to make and pass budgets for taxes, and to levy taxes upon property within their respective territorial limits as by the laws of Kansas provided.

That the city of Wichita, a municipal corporation of the state of Kansas, has the legal title to certain water pipeline, pumping equipment, and other appurtenances located in the county of Harvey, in the state of Kansas, and more specifically of certain of such property located within the respective territorial limits of said township of Lakin, and

said township of Halstead, in said county of Harvey, in the state of Kansas.

That the city of Wichita, Kansas, purchased and installed said water pipeline and other appurtenances located in said Lakin Township, and in said Halstead Township of Harvey County, Kansas, pursuant to a certain agreement with The Wichita Water Company in connection with a certain franchise arising under Ordinance No. 13-520 of the said city of Wichita, a true copy of which is attached to the Motion For Writ of Mandamus filed herein by the State of Kansas, which is herein referred to and incorporated as though set out herein at length.

That by reason of said Ordinance and Franchise agreement, the beneficial use of said water pipeline and other appurtenances is vested in The Wichita Water Company, a private corporation organized for profit, and is used by said company in the production of private gain or profit under said existing franchise.

That although the legal title of said property is vested in the city of Wichita, Kansas, under the constitution and laws of the state of Kansas, and of the United States, the said property has been and now is *subject to* taxation, and is not exempt therefrom.

*That failure to tax said property* in the past, and at this time, has been in violation of Section 1, Article XI of the constitution of the state of Kansas, which requires a uniform and equal rate of taxation, and in violation of the 14th Amendment of the constitution of the United States by reason of denial to these respective defendants, and their respective taxpayers, of equal protection under the law.

WHEREFORE, these answering defendants pray that the County Clerk of Harvey County, Kansas, and the State

Commission of Revenue and Taxation of Kansas, be directed to assess said property for taxation for the current and prior years according to law.

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Filed June 23, 1954.

**Answer.**

Comes now Bentley Public School District No. 185, Joint, of Bentley, Kansas, and Valley Center Township of Sedgwick County, Kansas, and by their attorney, J. Rodney Stone, of Newton, Kansas, and for their respective answer by way of intervention state:

That the intervenor, Bentley Public School District No. 185 Joint is a legally constituted and existing school district of Harvey and Sedgwick County, Kansas, and as such is authorized to make and pass budgets for taxes, and to levy taxes upon property within its territorial limits as by the laws of Kansas provided.

That the intervenor, Valley Center Township, is a legally constituted and existing township of Sedgwick County, Kansas, and as such is authorized to make and pass budgets for taxes, and to levy taxes upon property within its territorial limits as by the laws of Kansas provided.

That the city of Wichita, a municipal corporation of the state of Kansas, has the legal title to certain water pipe lines, pumping equipment, and other appurtenances located in the counties of Harvey and Sedgwick, in the state of Kansas, and more specifically of certain of such property located within the territorial limits of these respective intervening defendants, in said county of Harvey and Sedgwick, and in the county of Sedgwick respectively, within the said state of Kansas.

That the city of Wichita, Kansas, purchased and installed said pipe lines and other appurtenances located within the respective territorial limits of these intervening defendants, pursuant to a certain agreement with The Wichita Water Company in connection with a certain franchise arising under Ordinance No. 13-520 of the said city of Wichita, a true copy of which is attached to the Motion For Writ of Mandamus filed herein by the state of Kansas, which is herein referred to and incorporated as though set out herein at length.

That by reason of said Ordinance and Franchise agreement the beneficial use of said water pipe lines and other appurtenances is vested in The Wichita Water Company, a private corporation organized for profit, and is used by said company in the production of private profit and gain under said existing franchise.

That although the legal title of said property is vested in the city of Wichita, Kansas, under the constitution and laws of the state of Kansas, and of the United States, the said property has been and now is subject to taxation, and is not exempt therefrom.

That failure to tax said property in the past, and at this time, has been and is a violation of Section 1, Article XI of the constitution of the state of Kansas, which requires a uniform and equal rate of taxation, and in violation of the 14th Amendment of the constitution of the United States by reason of denial to these respective defendants, and their taxpayers, of equal protection under the law.

WHEREFORE, these intervening defendants pray that the County Clerk of Harvey County, Kansas, and the Commission of Revenue and Taxation of Kansas, be directed to assess said property for taxation for the current and prior years according to law, and that the Commission of

Revenue and Taxation of Kansas, be directed to cause said property within the county of Sedgwick, in the state of Kansas to be assessed for taxation for the current and prior years according to law.

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Filed June 23, 1954.

**Answer.**

Comes now Halstead Common School District No. 52 of Halstead, Kansas, and Rural High School District No. 1 of Halstead, Kansas, by their attorney, J. Rodney Stone, of Newton, Kansas, and for their answer by way of intervention states:

That these defendants are legally constituted and existing school districts of Harvey County, Kansas, and as such are each authorized to make and pass budgets for taxes, and to levy taxes upon property within their respective territorial limits as by the laws of Kansas provided.

That the city of Wichita, a municipal corporation of the state of Kansas, has the legal title to certain water pipelines, pumping equipment, and other appurtenances located in the county of Harvey, in the state of Kansas, and more specifically of certain of such property located within the respective territorial limits of said Halstead Common School District No. 52 of Halstead, Kansas, and said Rural High School District No. 1 of Halstead, Kansas, in said county of Harvey, in the state of Kansas.

That the city of Wichita, Kansas, purchased and installed said water pipelines and other appurtenances located in said Halstead Common School District No. 52 of Halstead, Kansas, and in Rural High School District No. 1 of Halstead, Kansas, pursuant to a certain agreement with The Wichita Water Company in connection with a certain

franchise arising under Ordinance No. 13-520 of said city of Wichita, a true copy of which is attached to the Motion For Writ of Mandamus filed herein by the State of Kansas, which is herein referred to and incorporated as though set out herein at length.

That by reason of said Ordinance and Franchise agreement, the beneficial use of said water pipelines and other appurtenances is vested in The Wichita Water Company, a private corporation organized for profit, and is used by said company in the production of private gain or profit under said existing franchise.

That although the legal title of said property is vested in the city of Wichita, Kansas, under the constitution and laws of the state of Kansas, and of the United States, the said property has been and now is subject to taxation, and is not exempt therefrom.

That the failure to tax said property in the past, and at this time, has been in violation of Section 1, Article XI of the constitution of the state of Kansas, which requires a uniform and equal rate of taxation, and in violation of the 14th Amendment of the constitution of the United States by reason of denial to these respective intervening defendants, and their respective taxpayers, of equal protection under the law.

WHEREFORE, these answering intervening defendants pray that the County Clerk of Harvey County, Kansas, and the State Commission of Revenue and Taxation of Kansas, be directed to assess said property for taxation for the current and prior years according to law.

No. 433. KANSAS EX REL. BROWN, COUNTY ATTORNEY, ET AL. *v.* HEDRICK, COUNTY CLERK, ET AL. Appeal from the Supreme Court of Kansas. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Kenneth G. Speir* for appellants. *Robt. B. Morton* and *Paul J. Donaldson* for the City of Wichita, Kansas, appellee. Reported below: 178 Kan. 135, 283 P. 2d 437.